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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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IN THE

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

FILED
COURT OF CRIMINAL APPEALS
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EX PARTE:

HECTOR MACIAS

Eighth Court of Appeals
No. 08-15-00013-CR
T.C. No. 20110C03140

RESPONDENT'S REPLY BRIEF

Oral Argument not ordered by the Court

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TRIAL COURT: County Criminal Court at Law Number Four, Judge Jesus R. Herrera, presiding.

COURT OF APPEALS: Eighth Court of Appeals, Honorable Chief Justice Ann Crawford McClure, Justice Yvonne T. Rodriguez, and Justice Steven L. Hughes

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STATEMENT OF THE CASE

Respondent filed application for habeas relief and contended that because he had been placed in jeopardy, at the earlier trial of January 16, 2015, the trial court and State were prohibited from prosecuting Respondent. Cr-88-90. The trial court heard and denied relief under the writ at an evidentiary hearing. Cr-101.

This case arises out of a 2011 charge that Macias struck his wife with his hand causing her bodily injury. When police responded to the domestic disturbance call giving rise to his arrest, Macias told an officer at the scene that "he had gone too far." Macias moved to suppress that statement claiming it was the result of an improper custodial interrogation. The trial court granted the suppression motion, leading the State to file an interlocutory appeal on March 27, 2012.1 It also filed a motion to stay further trial court proceedings. On April 11, 2013, the appellate court granted that motion and stayed any further proceedings pending further order.

On October 16, 2013, the appellate court issued its opinion and judgment reversing the trial court's suppression of the officer's statement. *State v. Macias*, 08-12-00107-CR, 2013 WL 5657979 (Tex.App.--El Paso Oct. 16, 2013, no pet.)(not

designated for publication). The same day--October 16, 2013--the trial court ordered the case to be set for trial on January 16, 2014. The court of appeals' mandate from the earlier appeal, however, did not issue until January 30, 2014.

REPLY TO STATE'S SOLE GROUND FOR REVIEW

THE COURT OF APPEALS PROPERLY HELD THAT THE TRIAL COURT WAS WITH JURISDICTION TO TRY THE CASE CONSISTENT WITH RULE 25(g) T.R.A.P., AND THE STATE'S RIGHT TO APPEAL WAS NOT *ABRIDGED* UNDER ARTICLE 44.01 T.C.C.P.

STATEMENT OF FACTS

Respondent, Hector Macias was charged by complaint and information with the misdemeanor offense of assault. Rr-8-11. On the 16th day of January, 2015, this case was tried before a jury. Rr2-p3. The jury was sworn to render a true and correct verdict. Rr2-93. Respondent pleaded not guilty. Rr2-98. Witnesses were called and examined. Rr2-100-198; 242-247. The State and the defense closed the evidence. Rr2-255. The trial court instructed the jury with the court's charge. Rr2-257-265. Subsequently, the State informed the trial court that the State had pursued an appeal on the trial court's granting of Respondent's motion to suppress evidence; and, that the Court of Appeals had not yet entered the mandate. Rr2-269-272. Respondent raised his double jeopardy argument, and indicated that he had already participated in a day and a half of trial. Rr2-272-273. Respondent placed the onus of trial readiness and jurisdiction upon the trial court and State. Id. The trial court agreed with the State that the instant case and proceedings had been a nullity. The trial court adjourned proceedings until such time as the Court of Appeals issued the mandate. The trial court adjourned and released the jury. Rr2-274-275. The mandate was issued by the Court of Appeals on January 30, 2014. Cr-75. Respondent filed application for habeas relief and contended that because he had been placed in jeopardy, at the earlier trial, described above, the trial court and State were prohibited from prosecuting Respondent. Cr-88-90. The trial court

heard and denied relief under the writ at an evidentiary hearing. Cr-101.

At the evidentiary hearing, Respondent argued that he could not be tried again because he had already been subjected to jeopardy. The State argued that jeopardy had not attached, and that because the mandate had not issued by the Court of Appeals, the trial court was without jurisdiction. Rr-writ-4-11.

In his sole issue on habeas appeal, Macias contended that the Fifth Amendment to the United States Constitution prohibited a retrial of his case. On December 14, 2016, the Eighth Court of Appeals granted relief to Macias in an unpublished opinion. Excerpts of that opinion are quoted infra. The State was granted PDR by the Honorable Court of Criminal Appeals.

SUMMARY OF RESPONDENT'S ARGUMENT

The State's right to appeal the trial court's granting of the Respondent's motion to suppress was not denied under article 44.01(e) of the Code of Criminal Procedure. The State did appeal. Further, the trial court was with jurisdiction to proceed to jury trial, under Rule 25.2(g) of the Rules of Appellate Procedure, after the State announced "ready for trial" because the State's interlocutory appeal did not suspend the trial court's power *to proceed on the merits*. Finally, by announcing ready for trial, the State is estopped from asserting that the trial court was without jurisdiction to try the case.

ARGUMENT AND AUTHORITIES

REPLY TO THE STATE'S SOLE GROUND FOR REVIEW: The Court of Appeals properly held that the trial court was with jurisdiction to try the case consistent with Rule 25(g) T.R.A.P., and the State's right to appeal was not abridged under Article 44.01 T.C.C.P.

The State argues that the Eighth Court has "abridged" the State's right to appeal. State's Brief, 6-23. In the instant case, as indicated above, the State appealed the trial court's granting of Respondent's motion to suppress. The State prevailed, and

the Eighth Court remanded the instant case to the trial court for trial. The State did appeal, and won. The State went to trial and prosecuted Defendant-Respondent. As indicated and cited above, the jury was empaneled and sworn; witnesses were called; both sides rested and closed; the charge was prepared; and, the parties were ready to argue. At that point, the State's appellate section told the State's trial lawyers to nix the case because the Eighth Court's mandate had not yet issued. And now the State says that the Eighth Court "abridged" the State's right to appeal. The State's assertion is rather ironic.

The State places Respondent-Defendant through the agony of prosecution, the expense, the anxiety, the turmoil—after the State had appealed the pretrial ruling—and now the State says the Eighth Court deprived the State of its opportunity to appeal. The State did appeal and proceeded to zealously prosecute Respondent-Defendant. The State says its opportunity to appeal was abridged because the State chose to place Respondent-Defendant in jeopardy before the mandate issued by the Eighth Court. Just before argument, at trial, the State basically said, "Oh. We were just kidding. Because the mandate has not yet issued, this whole ordeal was just a nullity. So be a good boy. Accept it. And we'll all get together a little later, to actually try the case." The State should be estopped from asserting its position because Respondent detrimentally relied on the State's assertion that it was

"ready" to prosecute Mr. Macias. Estoppel is discussed below.

The State's position is that because the mandate had not yet issued, the trial court was without jurisdiction, and, a fortiori, Respondent-Defendant was never placed in jeopardy. So, now the Honorable Court of Criminal Appeals is deciding whether jeopardy had ever attached, and whether a mandate is necessary (during an interlocutory appeal by the State) to allow jurisdictional jeopardy to attach against Respondent-Defendant. Of course, the State's argument would be different had the State been successful in the instant prosecution with a guilty verdict and sentence before the mandate issued…

The salient language of the Eighth Court's opinion includes:

> The jurisdictional question the State raises is really its defensive counter-argument. Macias makes out a prima facie double jeopardy argument by showing that a jury was sworn and empaneled, that the proceeding then terminated, and now the State intends to continue the prosecution. Macias makes that argument in his brief with appropriate citations to the record and the case law. The State counters that argument by contending that the trial was something of a legal fiction because the lower court was without jurisdiction. Macias could have chosen to pre-empt that argument in his brief on the merits, or waited to respond to the argument, if he could, in a reply brief, or ignore it at his peril. But his response to the State's position goes to the merits of the appeal, and not the briefing sufficiency of his primary argument.

Opinion, 7-8.

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As we alluded to in the introduction, the State premises its contention that the trial court lacked jurisdiction on TEX.R.APP.P. 25.2(g) which states that "[o]nce the record has been filed in the appellate court, all further proceedings in the trial court--except as provided otherwise by law or by these rules--will be suspended until the trial court receives the appellate-court mandate." On its face, Rule 25.2(g) seemingly denied the trial court any jurisdiction to act from May 8, 2012 (the date the record was filed in the earlier appeal) to January 30, 2013 (the date the mandate issued).

Case law, however, has applied a gloss to the wording of Rule 25.2(g), which we cannot ignore. If an appeal arises from a *final conviction*, Rule 25.2(g) indeed denies the trial court the ability to conduct all but the most limited proceedings until issuance of the mandate. *Farris v. State*, 712 S.W.2d 512, 514 (Tex.Crim.App. 1986)("A trial court's power to act in a given case ends when the appellate record is filed in the court of appeals, except for matters concerning bond."); *see also Green v. State*, 906 S.W.2d 937, 939 (Tex.Crim.App. 1995). But this Court has held that the rule applies differently in an *interlocutory* appeal when there is no final conviction. *In re State*, 50 S.W.3d 100, 102 (Tex.App.--El Paso 2001, orig. proceeding); *see also Peters v. State*, 651 S.W.2d 31 (Tex.App.--Dallas 1983, pet. dism'd). *In re State* arose out of a trial court's order suppressing a piece of evidence which led to an interlocutory appeal. 50 S.W.3d at 101. During the pendency of that appeal, the trial court conducted additional hearings on the suppression of other evidence. *Id*. at 102. The State pursued a mandamus challenging the second suppression order and contended, as it does here, that the trial court was without jurisdiction to hear additional matters so long as the first interlocutory appeal was before this court. We disagreed and wrote that "[d]espite [Rule 25.5(g)'s] broad language, however, we find it does not apply to interlocutory appeals where no final judgment has been entered." *Id.* at 102.

In re State involved jurisdiction to conduct a second suppression hearing, while this case involves jurisdiction over a trial on the merits. But that distinction is of no import based on our earlier rationale. We principally relied on *Peters v. State*, 651 S.W.2d 31 (Tex.App.--Dallas 1983, pet. dism'd), which holds "an appeal from a preliminary order does not suspend the trial court's power *to proceed on the merits*." [Emphasis added]. *Id.* at 33. In *Peters*, the defendant had been placed on deferred adjudication, thus there was no final conviction. He was assessed a fine and when he could not, or would not pay the fine, he was put in jail. *Id*. at 32. He then filed a habeas proceeding contending that the fine was illegal because he had never been finally convicted. *Id*. While the habeas application was on appeal, the State moved to have him adjudicated guilty for failure to pay the fine, and the trial

court did so, entering a finding of guilt. *Id*. On appeal from that finding, he claimed that the pending habeas appeal denied the trial court the jurisdiction to make the finding of guilt. In an opinion by Justice Guittard, the court disagreed, reasoning that Article 44.11 (the predecessor to 25.2(g)) had never been applied to pre-conviction habeas corpus. *Id.* at 33.

Thus *Peters* and *In re State* stand for the proposition that pending an interlocutory appeal, the trial court retains jurisdiction over the case, even as to conducting a final hearing on the merits. Though rarely cited, we find no contrary case law authority to either *In re State* or *Peters*. The Dallas Court of Appeals recently relied on its earlier decision in *Peters*. *State v*

Opinion, 9-11.

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Case law, however, has applied a gloss to the wording of Rule 25.2(g), which we cannot ignore. If an appeal arises from a *final conviction*, Rule 25.2(g) indeed denies the trial court the ability to conduct all but the most limited proceedings until issuance of the mandate. *Farris v. State*, 712 S.W.2d 512, 514 (Tex.Crim.App. 1986)("A trial court's power to act in a given case ends when the appellate record is filed in the court of appeals, except for matters concerning bond."); *see also Green v. State*, 906 S.W.2d 937, 939 (Tex.Crim.App. 1995). But this Court has held that the rule applies differently in an *interlocutory* appeal when there is no final conviction. *In re State*, 50 S.W.3d 100, 102 (Tex.App.--El Paso 2001, orig. proceeding); *see also Peters v. State*, 651 S.W.2d 31 (Tex.App.--Dallas 1983, pet. dism'd).

Opinion, 10.

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In supplemental briefing, the State urges that we should not follow *In re State* for two reasons. First, it contends that *In re State* was erroneously based on a rule of civil appellate procedure for which there is no criminal rule counterpart. And indeed, *In re State* cites as "guidance" TEX.R.APP.P. 29.5 which governs interlocutory appeals in civil cases. 50 S.W.3d at 103. That rule provides that while an interlocutory appeal is pending, the trial court has continuing jurisdiction over the case so long its actions are consistent with the appellate court's temporary

orders, and the trial court does not interfere with or impair "the jurisdiction of the appellate court or effectiveness of any relief sought or that may be granted on appeal." *Id*. We did not cite the rule as controlling authority, nor do we do so here. The civil rule highlights an obvious corollary to the trial court's continued jurisdiction: when an interlocutory appeal is pending, the trial court cannot conduct further proceedings that undermine the relief being sought on appeal. That concern is not raised here, as the trial court admitted into evidence the statement which our earlier decision held had been erroneously suppressed.

Opinion, 12.

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THE STAY ORDER

The parties do not address the effect of the stay order that we entered in the earlier appeal. We think it bears comment. Our order required the lower court to stay any further proceedings "pending further order of this Court." The judgment we issued in the earlier appeal remands the case for trial, and would qualify as such a "further order." We raise the question of when that judgment became effective (and thus lifted our stay). TEX.R.APP.P. 18.6 states that in an interlocutory appeal, the judgment takes effect when the mandate is issued. The heading for Rule 18.6, however, is titled "Mandate in Accelerated Appeals." The State's earlier appeal in this case was not technically an accelerated appeal, but rather is termed a priority appeal. Cf. TEX.CODE CRIM.PROC.ANN. art. 44.01(f)(West Supp. 2015)("The court of appeals shall give precedence in its docket to an appeal filed under Subsection (a) or (b) of this this article.") *with* TEX.R.APP.P. 40.1 (recognizing distinction between cases given "precedence by law" and "accelerated appeals"). We conclude that Rule 18.6 does not apply here because the earlier appeal was not a true accelerated appeal. Accordingly, the trial court would have fairly concluded that our judgment, issued on October 16, 2013, lifted our stay order as of that date.

CONCLUSION

In short, Macias carries the burden to prove entitlement to habeas relief. *Ex parte Richardson*, 70 S.W.3d 865, 870 (Tex.Crim.App. 2002). He has made that showing here. We sustain Issue One and reverse the denial of the Pretrial Application for Writ of Habeas Corpus. We remand the case back the trial court with instructions to grant the application and dismiss the indictment in this case.

Opinion, 17-18.

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Respondent-Defendant tries to understand the State's argument: The State argues that the Eighth Court of Appeals deprived the State of its right to appeal when: 1) the State pursued an interlocutory appeal; 2) the State prevailed on its interlocutory appeal; 3) the case was remanded for trial; 4) the State announced ready for trial; 5) the State prosecuted Respondent at trial; 6) evidence was presented; 7) the State and defense rested and closed; and, 8) the State moved for mistrial because the State discovered that the mandate from the Eighth Court had not issued. Perhaps the State is saying: the trial court deprived the State of its right to prosecute Respondent-Defendant because the State proceeded to prosecute the case, after appeal, and did prosecute the case by announcing "ready" and presenting evidence, after the jury was sworn, but then, telling the judge that it was just a practice run because the mandate had not yet issued. The State says that its actions were the fault of the Eighth Court of Appeals. None of this quagmire of procedural ordeal is the fault of Respondent-Defendant; it is the fault of the State, and the State should own its fault and not blame the Eighth Court of Appeals.

In the case of Edwards Aquifer v. Chemical Lime, 291 S.W.3d 392 (Tex. 2009), the Texas Supreme Court held at page 392:

Whether, as a general matter, an appellate court's decision takes effect the moment

the court issues its opinion, order, or judgment, or later when rehearing is denied or the time for rehearing expires, or still later when the clerk issues the mandate, is a difficult question under Texas law and procedure, as reflected by the competing arguments in JUSTICE BRISTER'S and JUSTICE WILLETT'S separate opinions, and one we need not answer today. We all agree that if an appellate court expressly states the time for its decision to take effect, that statement controls. That rule applies here.

Moot

The State's contention that it was not allowed an appeal is moot because the State did prosecute its appeal. For example, a petitioner may seek an appeal on excessive bail; however, during the pendency of that appeal, if the petitioner becomes no longer confined by virtue of the allegedly excessive pre-trial bail amount, the issue becomes moot, and the petition to challenge will be dismissed. Ex Parte Jeffrey Peyton, No. PD-0677-16, Crim. App., March 23, 2017, not published. Another example is found in Alex Hernandez v. U.S. Bank Trust, -- S.W.3d-- (El Paso, February 17, 2017). Hernandez sought reduction of the supersedeas bond. The reviewing court held that because Hernandez did not timely supersede the judgment, his request to reduce was denied as moot. Id. at page 6. In the case at hand, Respondent argues that the State's Petition should be dismissed as moot because the State did prosecute its appeal.

Respondent's Motion to Dismiss State's Petition

The parties do not dispute that the trial court empaneled and swore in the jury. The federal constitution provides that jeopardy attaches when the jury is impaneled and sworn. Crist v. Bretz, 437 U.S. 28, 38, 98 S. Ct. 2156, 2162 (1978); State v. Moreno, 294 S.W.3d 594, 597 (Tex. Crim. App. 2009). In Castro v. State, 233 S.W.3d 46 (Tex. App.—Houston [1st Dist.] 2007, no pet.), the Houston Court indicated that for the purposes of Article 36.29(a), trial likewise "begins" once the jury is impaneled and sworn. See Castro, 233 S.W.3d at 48 & n.1; accord McClellan v. State, 143 S.W.3d 395, 399-400 (Tex. App.—Austin 2004, no pet.); see also Maten v. State, 962 S.W.2d 226, 227 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd) (analyzing former version of Article 36.29(a) and holding that "[a] case is pending from the moment the jury is sworn to try the case"). In addition, "trial on the merits," as that phrase is used in Article 28.10(a) of the Code of Criminal Procedure, has been held to commence when the jury is impaneled and sworn. See, e.g., Hinojosa v. State, 875 S.W.2d 339, 342 (Tex. App.—Corpus Christi 1994, no pet.), cited with approval in Sanchez v. State, 138 S.W.3d 324, 329 (Tex. Crim. App. 2004).

According to State v. Moreno, 294 S.W.3d 594, 597 (Crim. App. 2009), the trial court's granting of an instructed verdict on behalf of the defense and after jeopardy attached, was not subject to appellate review. For this reason, and

because Respondent asserts that jeopardy had attached in the instant case, Respondent moves for dismissal of the State's Petition. In the case of Fong Foo v. United States, infra, the district judge directed a verdict of acquittal before the Government finished presenting its evidence because of a supposed lack of witness credibility and prosecutorial misconduct. The First Circuit Court of Appeals held that the judge did not have authority to enter a verdict before the Government rested its case. The Supreme Court recognized that the judge's actions were "egregiously erroneous," but nevertheless held that the Double Jeopardy Clause prohibited the court of appeals from setting aside the verdict of acquittal and subjecting the defendant to another trial. Fong Foo v. U.S., 369 U.S. 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962)

Numerous cases after Fong Foo reinforced the principle that the Double Jeopardy Clause bars further prosecution, including prosecution-initiated-appellate review, even if the acquittal resulted from patent judicial error. For example, in Sanabria v. United States, the trial judge excluded certain evidence as irrelevant and then held that the remaining evidence was insufficient. The Supreme Court held that the acquittal for insufficient evidence could not be appealed, even though it resulted from an erroneous evidentiary ruling. Sanabria v. United States, 437 U.S. 54 (1978). For these reasons, Respondent moves that the State's Petition be dismissed.

Estoppel

Respondent argues that, because the State announced ready for trial, the State is now estopped from arguing that jeopardy did not attach and arguing that the trial court did not have jurisdiction to try the case. In the landmark case of Prytash v. State, 3 S.W.3d 522, 531-532 (Crim. App. 1999), Prystash was estopped from complaining on appeal about the trial judge's failure to include an anti-parties special issue in the jury charge because his attorney had affirmatively asked the trial judge to leave it out. See also, Peacock v. State, 77 S.W.3d 285 (Crim. App. 2002); Arroyo v. State, 117 S.W.3d 795 (Crim. App. 2003); Equity in Texas Criminal Law, Voice, March 2005, p. 20-26, DeKoatz, Mateo. For these reasons, Respondent urges the Court to opine that the State is now estopped from arguing that the failure of the Eighth Court of Appeals to issue a mandate deprived the trial court of jurisdiction to try the case now pending before the Court of Criminal Appeals.

The Merits

Addressing the merits of the State's argument, Respondent adopts and argues the position of the Eighth Court:

The State premises its contention that the trial court lacked jurisdiction on

TEX.R.APP.P. 25.2(g) which states that "[o]nce the record has been filed in the appellate court, all further proceedings in the trial court--except as provided otherwise by law or by these rules--will be suspended until the trial court receives the appellate-court mandate." On its face, Rule 25.2(g) appears to deny the trial court any jurisdiction to act from May 8, 2012 (the date the record was filed in the earlier appeal) to January 30, 2013 (the date the mandate issued). Case law, however, fleshes out the wording of Rule 25.2(g). If an appeal arises from a *final conviction*, Rule 25.2(g) denies the trial court the ability to conduct all but the most limited proceedings until issuance of the mandate. *Farris v. State*, 712 S.W.2d 512, 514 (Tex.Crim.App. 1986)("A trial court's power to act in a given case ends when the appellate record is filed in the court of appeals, except for matters concerning bond."); *see also Green v. State*, 906 S.W.2d 937, 939 (Tex.Crim.App. 1995). The Eighth Court of Appeals has held that the rule applies differently in an *interlocutory* appeal when there is no final conviction. *In re State*, 50 S.W.3d 100, 102 (Tex.App.--El Paso 2001, orig. proceeding); *see also Peters v. State*, 651 S.W.2d 31 (Tex.App.--Dallas 1983, pet. dism'd). *In re State* arose out of a trial court's order suppressing a piece of evidence which led to an interlocutory appeal. 50 S.W.3d at 101. During the pendency of that appeal, the trial court conducted additional hearings on the suppression of other evidence. *Id*. at 102. The State pursued a mandamus challenging the second suppression order and contended, as it

does in the case at bar, that the trial court was without jurisdiction to hear additional matters so long as the first interlocutory appeal was before this court. The Eighth Court disagreed and wrote that "[d]espite [Rule 25.5(g)'s] broad language, the Court found that it does not apply to interlocutory appeals where no final judgment has been entered." *Id.* at 102.

The Eighth Court relied on *Peters v. State*, 651 S.W.2d 31 (Tex.App.--Dallas 1983, pet. dism'd), which holds "an appeal from a preliminary order does not suspend the trial court's power *to proceed on the merits*." [Emphasis added]. *Id.* at 33. In *Peters*, the defendant had been placed on deferred adjudication, thus there was no final conviction. He was assessed a fine and when he could not, or would not pay the fine, he was put in jail. *Id*. at 32. He then filed a habeas proceeding contending that the fine was illegal because he had never been finally convicted. *Id*. While the habeas application was on appeal, the State moved to have him adjudicated guilty for failure to pay the fine, and the trial court did so, entering a finding of guilt. *Id*. On appeal from that finding, he claimed that the pending habeas appeal denied the trial court the jurisdiction to make the finding of guilt. In an opinion by Justice Guittard, the court disagreed, reasoning that Article 44.11 (the predecessor to 25.2(g)) had never been applied to pre-conviction habeas corpus. *Id.* at 33.

Thus *Peters* and *In re State* stand for the proposition that pending an interlocutory

appeal, the trial court retains jurisdiction over the case, even as to conducting a final hearing on the merits.

The State in its brief, pages 8 and 9, avers:

And article 44.01(e) provides that the State is entitled to a stay of the proceedings pending the disposition of a State's appeal filed under subsection (a): The state is entitled to a stay in the proceedings pending the disposition of an appeal under Subsection (a) or (b) of this article. *See* art. 44.01(e). Rule 25.2(a) of the Rules of Appellate Procedure additionally provides that "[t]he State is entitled to appeal a court's order in a criminal case as provided by Code of Criminal Procedure article 44.01." *See* TEX. R. APP. P. 25.2(a). And rule 25.2(g), which describes the effect of a criminal-case appeal under rule 25.2, states that: Once the record has been filed in the appellate court, all further proceedings in the trial court–except as provided otherwise by law or by these rules–will be suspended until the trial court receives the appellate-court mandate. *See* TEX. R. APP. P. 25.2(g).

Additional portions of the text of article 44.01 include:

Art. 44.01. APPEAL BY STATE. (a) The state is entitled to appeal an order of a court in a criminal case if the order:

(1) dismisses an indictment, information, or complaint or any portion of an indictment, information, or complaint;

(2) arrests or modifies a judgment;

(3) grants a new trial;

(4) sustains a claim of former jeopardy;

(5) grants a motion to suppress evidence, a confession, or an admission, *if jeopardy has not attached in the case* and if the prosecuting attorney certifies to the trial court that the appeal is not taken for the purpose of delay and that the evidence, confession, or admission is of substantial importance in the case; or

(6) is issued under Chapter 64.

(b) The state is entitled to appeal a sentence in a case on the ground that the

sentence is illegal.

(c) The state is entitled to appeal a ruling on a question of law if the defendant is convicted in the case and appeals the judgment.

(d) The prosecuting attorney may not make an appeal under Subsection (a) or (b) of this article later than the 20th day after the date on which the order, ruling, or sentence to be appealed is entered by the court.

(e) The state is entitled to a stay in the proceedings pending the disposition of an appeal under Subsection (a) or (b) of this article.

The Article 44.01 (a)(5) provision, above, mentions that a stay concerning a motion to suppress is effective so long as jeopardy has not attached in the case. Respondent at bar argues that once the jury was sworn in at the trial on his case, any viable stay was no longer viable because jeopardy had attached at Respondent's trial. Article 44.01 (a)(5), (e), supra.

CONCLUSION

In conclusion, Respondent Hector Macias prays that the Court affirm the decision by the Eighth Court of Appeals granting relief to Macias and remanding this case to the trial court for order of dismissal.

PRAYER FOR RELIEF

For all the above reasons, Respondent Macias respectfully prays that the Honorable Court of Criminal Appeals affirm the decision of the Court of Appeals, and reverse the decision of the trial court, and remand this case to the trial court for order of dismissal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(1), the undersigned does hereby certify, based on the computer program used to generate this document, that the foregoing document contains 4,663 words, excluding words contained in those parts of the document that Rule 9.4(i)(1) exempts from inclusion in the word count.

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CERTIFICATE OF SERVICE

(1) The undersigned counsel hereby acknowledges that on this the 10th day of August, 2017, a copy of the foregoing Respondent's Reply Brief to the State's Brief in support of petition for discretionary review was sent by email, through an electronic-filing-service provider, to State's attorneys: Jaime Esparza, District Attorney, daesparza@epcounty.com; Lily Stroud, Assistant District Attorney, lstroud@epcounty.com.

(2) The undersigned also does hereby certify that on this the 10th day of

August, 2017, a copy of the foregoing Respondent's Reply Brief to the State's Brief in support of petition for discretionary review was sent by email, through an electronic-filing-service provider, to the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Maximino Daniel Munoz

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